

No. 16,298 ✓

IN THE

United States Court of Appeals
For the Ninth Circuit

VIRGINIA J. KING, as Administratrix of
the Estate of John Elvins King,
Appellant,

vs.

PAN AMERICAN WORLD AIRWAYS, a cor-
poration,
Appellee.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

The appeal is by the libelant Virginia J. King, as administratrix, from an adverse decree in a suit in admiralty to recover damages for wrongful death occurring on the high seas.

STATEMENT OF JURISDICTION.

Paragraphs V-VIII of the libel in the court below alleged that the death of libelant's intestate and husband, John Elvins King, was caused by the wrongful act or neglect of the respondent, Pan American World

Airways, occurring on the high seas between Honolulu, Hawaii, and continental United States beyond a marine league from shore. T. 4-6. The death of the High Seas Act (41 Stat. 537 (1920), 46 U.S.C. §§761-767). T. 6. Jurisdiction of the District Court is therefore sustained by 28 U.S.C. §1333.

The final decree of the District Court was entered October 22, 1958. T. 49. Notice of appeal to this court was filed November 14, 1958. T. 49-50. The appeal was timely. 28 U.S.C. §2107. Jurisdiction of this court to review the final decree of the District Court is therefore sustained by 28 U.S.C. §§1291, 1294.

STATEMENT OF THE CASE.

The libelant alleged in the libel that the death of her husband, John Elvins King, occurred November 8, 1957, when an airplane owned and operated by respondent Pan American World Airways, and on which Mr. King was employed, fell and crashed on the high seas between territorial Hawaii and continental United States beyond a marine league from shore. T. 4-5. His death was ascribed to the wrongful acts and neglect of respondent. T. 5-6. The libelant also alleged that she was the duly appointed and acting administratrix of her husband's estate (T. 4) and that his heirs at law, consisting of herself, three daughters, and a son, had been damaged in the sum of \$275,000 by reason of his death, for which sum judgment was prayed (T. 6-8). The libel was filed February 3, 1958. T. 8.

Respondent's answer admitted that Mr. King's death occurred on the high seas beyond a marine league from shore. T. 9. A special defense was that libelant was barred from maintaining the action by reason of the California Workmen's Compensation Act and sections 3600 and 3601 of the California Labor Code. T. 9-10. The answer was filed March 27, 1958. T. 12.

A hybrid motion labeled Exceptions to Libel and Motion for Summary Judgment was filed by respondent on May 21, 1958. T. 31. The ground of the motion was that "the pleadings and the Stipulation of Facts filed herein demonstrate that on the basis of the undisputed facts, Respondent Pan American World Airways, Inc. is entitled to judgment as a matter of law". T. 14.

The Stipulation of Facts accompanying the motion (T. 15-19) recited that respondent was a New York corporation, and decedent and libelant residents of California (T. 16); that decedent was continuously employed by the respondent from October 12, 1942, to December 31, 1947, and continuously based at San Francisco (T. 16); that on May 1, 1957, decedent became Flight Supervisor for respondent at the San Francisco Airport, and his duties required him to fly approximately 600 flying hours during a yearly employment of approximately 2080 hours (T. 17); that at and prior to November 8, 1957, respondent carried California Workmen's Compensation with Travelers Insurance Company (T. 17); that "decedent, John Elvins King, left the San Francisco International

Airport, South San Francisco, California, alive on November 8, 1957, on board Pan American Flight No. 7, the first stop of which was Territory of Hawaii, U.S.A. At the time of his death, decedent, John Elvins King, was performing services growing out of and incident to his employment, and was acting within the course of his employment, and his death was not caused by intoxication. On November 8, 1957, the airplane entered the water at a point between San Francisco, California, and the Territory of Hawaii (Hawaiian Islands), more than one marine league from any shore line. Following said event John Elvins King was dead. The parties do not stipulate as to whether he died in the air or in the water” (T. 17-18); that an application filed by respondent and its said workmen’s compensation insurance carrier to determine liability for death benefit and burial expenses under the California Workmen’s Compensation Act was opposed by libelant and the jurisdiction of the Industrial Accident Commission contested (T. 18); that libelant did not appear voluntarily before the Commission or consent to its jurisdiction (T. 18); that the application resulted in a death benefit award (T. 18).

Annexed to the stipulation were copies of the application (T. 20-22), the award (T. 23-25), and the referee’s report (T. 26-31).

The stipulation expressly provided (T. 19):

“Entry into this stipulation shall not be deemed an admission by either party as to the relevancy or materiality of any of the facts stipulated to,

and the parties reserve their rights in this regard.”

An opinion and order of the District Court granting the motion for summary judgment was filed September 30, 1958. T. 31-38. It is reported as *King v. Pan American World Airways*, 166 F. Supp. 136.

The opinion began (T. 31):

“This cause presents the novel question whether the California Workmen’s Compensation Act precludes an action for wrongful death under the Federal Death on the High Seas Act by the administratrix of the estate of an airline employee who in the course of his employment was killed in the crash of an airliner on the high seas.”

And the opinion ended (T. 37-38):

“The Death on the High Seas Act was enacted to fill a void in the maritime law and provided an admiralty remedy for wrongful death where none had existed before. There is no indication that the Congress intended that this statutory remedy for death should have any different relation to the State Compensation Laws than the pre-existing non-statutory admiralty remedies for personal injury. Since the Supreme Court has ruled that State Compensation Acts, designed to afford an exclusive remedy to injured employees, abrogate the otherwise existing admiralty remedy for personal injuries in situations where the application of the state act does not interfere with the uniformity of the maritime law, it is reasonable to conclude that the Compensation Acts similarly abrogate the admiralty remedy for

wrongful death accorded by the Death on the High Seas Act.”

The final decree, entered October 22, 1958, adjudged that libelant, as administratrix, take nothing under the libel, and that respondent have summary judgment against libelant. T. 48-49.

SPECIFICATION OF ERRORS.

1. The District Court erred in granting the motion of respondent for summary judgment.
2. The District Court erred in decreeing that respondent have summary judgment against libelant.
3. The District Court erred in decreeing that libelant take nothing under the libel.
4. The District Court erred in decreeing that state compensation acts have abrogated the admiralty remedy for wrongful death accorded by the Death on the High Seas Act.
5. The final decree is against law.

ARGUMENT.

1. THE SUMMARY JUDGMENT FOR RESPONDENT SHOULD BE REVERSED FOR THE REASON THAT THE FEDERAL DEATH ON THE HIGH SEAS ACT CONFERRED UPON LIBELANT A CAUSE OF ACTION IN ADMIRALTY AND EXCLUDED APPLICATION OF STATE WORKMEN'S COMPENSATION LAWS. Specification of Errors Nos. 1, 2, 3, 4, 5.

The Death on the High Seas Act was enacted in 1920. 41 Stat. 537, 46 U.S.C., §§761-767. Sections 1

and 2 of the Act (41 Stat. 537, U.S.C., §§761, 762) provide:

“Sec. 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent’s wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.” (46 U.S.C., §761.)

“Sec. 2. The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.” (46 U.S.C., §762.)

The history of the act was reviewed by this court in *Higa v. Transocean Lines*, 9 Cir. 1955, 230 F. 2d 780, where the administrator of a passenger killed in an airplane crash on the high seas sought recovery of damages in a common law civil action. In holding that the action was properly dismissed because brought on the wrong side of the court, it was said, at page 785:

“Here, however, the Death on the High Seas Act creates the right to recover for wrongful

death and designates not only the federal court for its enforcement, but a particular jurisdiction of that court. The right is a matter of federal law where state courts would have no special competence. There is more here that 'the grant of jurisdiction, of itself * * *' which indicates that jurisdiction was intended to be exclusive."

And at page 786, the court added:

"Our disposition of this case makes unnecessary the determination whether the High Seas Act applies to airplanes which are not in any way water navigating vessels."

If doubt existed in this circuit as to the applicability of the Death on the High Seas Act to airplane crashes on the high seas it was dispelled by the decision in *Trihey v. Transocean Air Lines, Inc.*, 9 Cir. 1958, 255 F. 2d 824. In the second circuit the applicability of the Act to airplane crashes on the high seas or wrongful death occurring above, on, or in the high seas was expressly upheld in *D'Aleman v. Pan American World Airways*, 259 F. 2d 493. Commencing at page 494, the court said:

"The sole appellate point presented as to the first cause of action is whether the trial court should have heard this cause of action in admiralty. * * *

(495) The purpose of the Act was to create a uniform cause of action where none existed before and which arose beyond the territorial limits of the United States or any State thereof. When the Act was passed (March 30, 1920) the only feasible way to be carried beyond the jurisdiction

of any law applicable to wrongful death was by ship. However, with the development of the transoceanic airship the same extraterritorial situation was made possible in the air. The Act was designed to create a cause of action in an area not theretofore under the jurisdiction of any court. The means of transportation into the area is of no importance. The statutory expression 'on the high seas' should be capable of expansion to, under, or, over, as scientific advances change the methods of travel. The law would indeed be static if the identical location three thousand feet above in a plane were not. Nor should the plane have to crash into the sea to bring the death within the Act any more than a ship should have to sink as a prerequisite.

The reasons for holding that the Act should apply to air travel are well stated in *Choy v. Pan American Airways Co.*, 1941 A.M.C. 483, at pages 484-485 (S.D. N.Y., Clancy, J.). * * *

The same conclusion was reached in *Noel v. Linea Aeropostal Venezolana*, . . . 154 F.Supp. 162, at page 163 (Cashin, J.), affirmed 2 Cir. 247 F. 2d 677, in which he said:

'Neither authority * * *, the language of the Statute nor the dictates of common sense sustain a holding that the fulfillment of the jurisdictional requirements of the Federal Death on the High Seas Act is to be governed by the determination of such an elusive fact as whether a person died above, on or in the sea. * * *'

The facts of the case now before the court make a direct ruling on the question appropriate. To give to passengers on ships protection of the Act

and deny similar rights to passengers in the air (496) would amount to unjustifiable and highly technical determination.

(1) We, therefore, now hold that the Death on the High Seas Act grants a right of action in admiralty for death caused by wrongful act, neglect or default occurring in the air space over the high seas and that the trial court properly heard the case in admiralty.”

And in a concurring opinion by Waterman, C.J., it was said at page 496:

“Further, I believe it pertinent to point out that the Congress in enacting 46 U.S.C. §761 superseded state created causes of action for wrongful death arising from events occurring on the high seas. *Wilson v. Transocean Airlines*, D.C.N.D.Cal. 1954, 121 F. Supp. 85. And see *Echavarria v. Atlantic & Caribbean Steam Nav. Co.*, D.C.E.D.N.Y. 1935, 10 F. Supp. 677.”

The rule thus referred to by Judge Waterman has equal application to state workmen’s compensation acts. Thus in Comment c to Restatement, Conflict of Laws, §401, it is said:

“c. *Effect of Federal Employers’ Liability Act or admiralty jurisdiction.* If the case is one which is within the scope of a Federal Employers’ Liability Act, *or of admiralty jurisdiction*, the remedy under a State Workmen’s Compensation Act cannot be constitutionally allowed in any State of the United States. If the case comes under the Federal Act even though the Act provides no remedy under the circumstances, there

can be remedy under a Workmen's Compensation Act." (Emphasis added.)

And in the leading authority on the subject of workmen's compensation in California it is said (2 Hanna, *The Law of Employee Injuries and Workmen's Compensation*, 488):

"The High Seas Death Act covers the death of any person, *employee or otherwise*, caused by 'wrongful act, neglect or default, occurring on high seas.'" (Emphasis added.)

The California Workmen's Compensation Act was adopted in 1917. (2 Hanna, *The Law of Employee Injuries and Workmen's Compensation*, 27.) The District Court held in this case that the California Workmen's Compensation Act abrogated or superseded the Death on the High Seas Act. This was manifest error. The reverse was true. The Death on the High Seas Act abrogated or superseded state wrongful death acts, including compensation acts, where death occurred on the high seas.

The District Court therefore erred in granting the motion of respondent for summary judgment, it erred in decreeing that respondent have summary judgment against libelant, it erred in decreeing that libelant take nothing under the libel, it erred in decreeing that state compensation acts have abrogated the admiralty remedy for wrongful death accorded by the Death on the High Seas Act, and its final decree is against law.

CONCLUSION.

Appellant therefore respectfully submits that the summary judgment in favor of respondent should be reversed with directions to the District Court to hear and determine the suit in admiralty.

Dated, San Francisco, California,
April 2, 1959.

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